

A nutritional supplement could be classified as a food taxed at the reduced rate of tax if it is not considered sold for immediate consumption after application of the criteria detailed in 86 Ill. Adm. Code 130.310. See 86 Ill. Adm. Code 130.310 (This is a GIL.)

July 10, 2003

Dear Xxxxx:

This letter is in response to your letter dated April 29, 2003. The information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See, 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/Laws/regs/part1200>.

In your letter you stated and made inquiry as follows:

Our company represents a client who is in the process of developing a company that sells nutritional supplements. The company is based in CITY/STATE and expects to sell their products to customers in all 48 contiguous states in the United States. The company is not currently subject to an administrative matter before this or any other agency. There is no audit, no refund claim, no appeal of an audit or appeal of a refund claim currently before this or any other agency.

The purpose of this letter is to request a determination on the applicability of the sales/use tax of your state to the products sold by our client. Our client would collect and remit the sales/use tax to each state.

We request a ruling on the sales tax treatment of the following products.

1. Energy supplement
2. Children's chewable vitamin
3. Antioxidant supplement
4. XXX vitamin
5. Cholesterol supplement
6. Liquid botanical supplement
7. Calcium powder supplement (grapefruit & cran-raspberry flavors)
8. XXXXX Vegetable vitamin
9. Essential Fatty Acid supplement
10. Liquid mineral supplement (lemon-lime & cran-raspberry flavors)
11. Glucosamine supplement
12. OPC grape seed extract supplement
13. Women's liquid formula with black cohosh
14. Multienzyme supplement
15. Vitamin C with Echinacea

16. Vitamin C with Co-Q10
17. Greens supplement
18. Weight management supplement
19. Aloe and vitamin E supplement
20. Hydration supplement
21. XXXXX supplement
22. Nutritional shakes (chocolate & vanilla)
23. Nutritional bars (Cocoa Peanut Crisp & Oatmeal Cinnamon)
24. XXXXX supplement

The supplement fact panels for these products are attached for your reference. The numbers for the supplement fact panels correspond to the numbers in this letter and there is a legend at the bottom of the attached sheet for easy reference.

We would greatly appreciate it if you would identify the particular statute, regulation or ruling that forms the basis for your determination. We would also like to know your ruling regarding taxation in the event taxable and non-taxable items are combined together in a 'pack' for purchase by a consumer.

In addition, we request a statement regarding your policy on taxation of shipping and handling charges.

Please send your response to the undersigned at the address on this letterhead.

Thank you for your prompt consideration of this matter. If you have any questions, please do not hesitate to contact the undersigned at the number referenced above..

For your information and reference please find enclosed a copy of the Department's regulation on the reduced tax rate under the Retailers' Occupation Tax Act applicable to food, drugs, medicines and medical appliances, 86 Ill. Adm. Code 130.310. A 1% sales tax rate, plus applicable local taxes, is applied to food sold for human consumption to be consumed off the premises where sold, drugs, medicines and medical appliances. Food that is prepared for immediate consumption and items that do not qualify as drugs, medicines and medical appliances are taxed at the regular sales tax rate of 6.25%, plus any applicable local taxes.

Food is defined as "any solid, liquid, powder or item intended by the seller primarily for human consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice". See Section 130.310(b)(1).

Taxation of food at the reduced sales tax rate depends on whether the food is prepared by the retailer for immediate consumption or is for consumption off the premises where sold, therefore, the nature of the premises where the food is sold is a factor in determining the applicable sales tax rate. All sales by a retail establishment that provides facilities for on-premises consumption of food are subject to the high rate of tax unless the facility utilizes a separate means of recording and collecting receipts from food for consumption on the premises, and the area where food not for immediate consumption is sold is physically partitioned from the area of food sold for immediate consumption. See 86 Ill. Adm. Code 130.310(b)(2)(A) and (b)(3).

Where an establishment does not provide facilities for on-site consumption, the business would still charge a high rate of tax on all food sales if a majority of the gross receipts from food resulted from food prepared by the retailer for immediate consumption. However, where an

establishment primarily sells food (over 50%) in bulk, such establishment will incur the reduced rate on all food items, except soft drinks, food prepared by the retailer for immediate consumption and alcoholic beverages, which are always taxed at the high rate.

In general, nutritional supplements and vitamins are included within the definition of food, as that term is defined under the regulations. Therefore, such products would qualify for the reduced rate, provided they meet the criteria detailed in this letter and in 86 Ill. Adm. Code 130.310.

The taxation of nutritional supplements sold in packs with non-food items would depend upon whether the set was primarily made up of food items. If more than 50% of the value of a pack, set or gift basket of items sold together is derived from food or other products eligible for the reduced rate of tax, then the pack, set or gift basket is taxed at the reduced rate.

Additionally, some of the nutritional supplements sold by your client may also qualify for the lower tax rate because of the classification of those products as a drug. Under the regulation, medicine or drug is defined as "any pill, potion, salve, or other preparation intended by the manufacturer for human use and which purports on the label to have medicinal qualities". See Section 130.310(c)(1). A written claim on the label that a product is intended to cure or treat disease, illness, injury or pain, or to mitigate the symptoms of such disease, illness, injury or pain constitutes a medicinal claim. Please refer to the regulation for examples of medicinal claims that will qualify products for the low rate. If any of the nutritional supplements listed in your letter purport to have medicinal qualities, they may be considered a drug taxed at the lower, 1% sales tax rate.

In regards to the application of Retailers' Occupation Tax to transportation and delivery charges, also designated as shipping and handling charges, please refer to the enclosed copy of 86 Ill. Adm. Code 130.415. Such charges are not taxable if it can be shown that the charges are separately agreed to apart from the selling price of the tangible personal property sold and the charges are actually reflective of the costs of shipping. To the extent transportation and delivery charges exceed the costs of shipping, the charges will be subject to tax.

The best evidence that transportation and delivery charges have been contracted for separately by a purchaser and a retailer is a separate and distinct contract for transportation and delivery. However, documentation that demonstrates the purchaser had the option of taking delivery of the property at the seller's location for the agreed purchase price, or having delivery made by the seller for the agreed purchase price plus an ascertained or ascertainable delivery charge will suffice. See 86 Ill. Adm. Code 130.415(d).

Including the transportation and delivery charges in the selling price of the property sold, however, makes such charges an element of the cost to the seller and cannot be deducted by the seller when computing Retailers' Occupation Tax liability. See Section 130.415(c). Furthermore, transportation and delivery charges that are incurred by the seller in acquiring tangible personal property for sale are merely costs of doing business and are also not deductible when computing Retailers' Occupation Tax liability, regardless of the fact that the seller passes such costs on to the customer by quoting and billing such costs separately from the selling price of the property being sold. See Section 130.415(e).

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Sincerely,

Dana Deen Kinion
Associate Counsel

DDK: msk
Enc.